

FILED

OCT 29 2008

DISCIPLINARY COMMISSION OF THE  
SUPREME COURT OF ARIZONA  
BY

BEFORE THE DISCIPLINARY COMMISSION  
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )  
)  
MARSHALL FEALK, )  
Bar No. 003332 )  
)  
RESPONDENT. )  
\_\_\_\_\_ )

No. 05-1572

DISCIPLINARY COMMISSION  
REPORT

This matter first came before the Disciplinary Commission on October 13, 2007, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed August 21, 2007, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") providing for censure, one year of probation with the State Bar's Trust Account Program (TAP) and Trust Account Ethics Enhancement Program (TAEHP), and costs. The Commission rejected the agreement and remanded the matter because of the inconsistent findings and conclusions involving a negligent mental state and aggravating factor, 9.22(b) selfish and dishonest motive. See Commission Report filed November 1, 2007.

This matter then again came before the Commission on February 23, 2008, for consideration of the Amended Hearing Officer's Report filed February 4, 2008, recommending acceptance of the original Tender<sup>1</sup> and Amended Joint Memorandum providing for censure and one year of probation (TAP and TAEHP). Based on the

<sup>1</sup> An Amended Tender of Admissions for Discipline by Consent was not filed; however, the parties filed proposed Joint Findings of Fact and Conclusions of Law on August 12, 2008.

1 conditional admissions as stated, the Commission again rejected the Agreement having  
2 concluded that absent a hearing, it was still not convinced of a negligent mental state, and  
3 remanded the matter to the Hearing Officer. *See* Commission Report filed March 19,  
4 2008. A hearing on the Amended Agreement for Discipline for Consent was held on June  
5 11, 2008.

6 This matter again came before the Commission on October 17, 2008, for  
7 consideration of the Second Amended Hearing Officer's Report filed September 17, 2008,  
8 recommending censure, one year of probation (TAP and TAEPP). No specific terms of  
9 probation were included in this Report. Additionally, although the Seconded Amended  
10 Hearing Officer's Report did not specifically include a recommendation for costs;  
11 however, a Statement of Costs and Expenses was attached to the original Tender filed June  
12 1, 2007.

### 13 Decision

14 Having found no facts clearly erroneous, the eight members<sup>2</sup> of the Disciplinary  
15 Commission unanimously recommend accepting and incorporating the Hearing Officer's  
16 findings of fact, conclusions of law, and recommendation for censure, one year of  
17 probation (TAP and TAEPP) and costs of these disciplinary proceedings including any  
18 costs incurred by the Disciplinary Clerk's office.<sup>3</sup> The terms of probation are as follows:<sup>4</sup>

### 19 Terms of Probation

- 20  
21 1. Respondent shall sign a Probation Contract that shall include all applicable  
22

23 <sup>2</sup> Commissioner Houle recused.

24 <sup>3</sup> A copy of the Hearing Officer's report is attached as Exhibit A. The State Bar's costs and  
25 expenses total \$2,723.80.

26 <sup>4</sup> The Disciplinary Clerk's office contacted the parties regarding the omitted terms of probation and  
the parties do not object to the original agreed-upon terms as set forth in the Hearing Officer's  
previous Report and the Tender.

1 terms of participation including reporting requirements, and shall constitute the terms of  
2 probation. The Probation contract shall be signed by Respondent and returned to the Staff  
3 Examiner within 10 days of the date it is mailed to Respondent by the State Bar.  
4 Respondent shall, within 30 days of the Judgment and Order, contact the State Bar's Staff  
5 Examiner to begin participation in TAP. Respondent shall participate in TAP for the entire  
6 period of probation.

7 2. Respondent shall attend TAEPP within six months of signing the Probation  
8 Contract.

9 3. Pursuant to the provisions of Rule 60(a)(5), Ariz.R.Sup.Ct., the term of  
10 probation may be renewed for an additional two (2) year period.

11 4. In the event that Respondent fails to comply with any of the foregoing  
12 conditions, and the State Bar receives information, bar counsel shall file with the imposing  
13 entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The Hearing  
14 Officer shall conduct a hearing within thirty days after receipt of said notice, to determine  
15 whether the terms of probation have been violated and if an additional sanction should be  
16 imposed. In the event there is an allegation that any of these terms have been violated, the burden  
17 of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing  
18 evidence.  
19

20 RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of October, 2008.

21  
22 

23 Daisy Flores, Chair  
24 Disciplinary Commission

25 Original filed with the Disciplinary Clerk  
26 this 29<sup>th</sup> day of October, 2008.  
Copy of the foregoing mailed

this 29<sup>th</sup> day of October, 2008, to:

Juan Perez-Medrano  
Hearing Officer 9D  
360 North Court Avenue  
Tucson, AZ 85701

Robert J. St. Clair  
Respondent's Counsel  
Freeman & St. Clair, P.L.L.C.  
211 North Court Avenue, 2<sup>nd</sup> Floor  
Tucson, AZ 85701

Patricia J. Ramirez  
Bar Counsel  
State Bar of Arizona  
4201 North 24<sup>th</sup> Street, Suite 200  
Phoenix, AZ 85016-6288

by: 

/mps

# **EXHIBIT**

## **A**

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**BEFORE A HEARING OFFICER OF  
THE SUPREME COURT OF ARIZONA**

**FILED**

SEP 17 2008

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY                     

**IN THE MATTER OF A MEMBER  
OF THE STATE BAR OF ARIZONA,**

No. 05-1572

**MARSHALL FEALK,  
Bar No. 003332**

**SECOND AMENDED  
HEARING OFFICER'S  
REPORT**

Respondent.

**I. PROCEDURAL HISTORY**

No formal Complaint has been filed in this matter. An Agreement for Discipline by Consent was submitted to this Hearing Officer on June 1, 2007. This Hearing Officer reviewed the consent documents and submitted his Findings of Fact and Conclusions of Law to the Disciplinary Commission (the "Commission") on August 21, 2007. The Commission rejected the agreement because one of the aggravating factors did not support a "negligent" state of mind.

After removing the aggravating factor, an Amended Agreement for Discipline by Consent was submitted to this Hearing Officer on December 5, 2007. A prior disciplinary offense was added to the agreement. However, the prior discipline was remote in time, having occurred in 1991.

This Hearing Officer then submitted his Amended Hearing Officer's Report to the Commission on February 4, 2008. The amended agreement was

1 rejected; however, no reason was given by the Commission for its rejection.

2 A hearing on the Amended Agreement for Discipline by Consent was held  
3 on June 11, 2008. This Hearing Officer ordered the parties to file Proposed  
4 Findings of Fact and Conclusions of Law.  
5

## 6 7 **II. FINDINGS OF FACT**<sup>1</sup>

8 1. Mr. Patronaggio is Respondent's former client. Respondent previously  
9 prepared Mr. Patronaggio's estate plan for which Respondent believes he was  
10 paid a \$3,000 flat fee. [Hearing Transcript page 5: lines 22-23; 49:13-17]<sup>2</sup>  
11

12 2. According to Respondent, prior to hiring him for that purpose, Mr.  
13 Patronaggio had hired two other attorneys to prepare his estate plan, and  
14 subsequently refused to pay either of them, despite the fact that the documents  
15 had been completed. [Tr. 5:23-25; 25:24-26:2]

16 3. Respondent completed Mr. Patronaggio's estate plan to his satisfaction  
17 in three and one-half months. [Tr. 39:3-12]

18 4. Thereafter, Mr. Patronaggio contacted Respondent regarding a ninety-  
19 day letter that he had received from the IRS on behalf of his corporation, Caliber  
20 Homes. This letter requires a response from the taxpayer within ninety days. [Tr.  
21

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22  
23 <sup>1</sup> The Hearing Officer consolidates these findings of fact with those he  
24 previously found in his Amended Hearing Officer's Report.

25 <sup>2</sup> Hereinafter, references to the transcript of the hearing conducted June 11,  
2007, will be referred to as "Tr." followed by "page number(s): line number(s)".

1 6:1-7; 15:13-18]

2 5. The tax matter arose as the result of a failure to file a tax return for  
3 Caliber Homes in 2002. It was unclear who was responsible, Mr. Patronaggio or  
4 Mr. Spitzer, the accountant for whom Ms. Sabbagh worked. [Tr. 23:3-7]

5 6. According to Respondent, there were not many facts available with  
6 regard to the tax matter, but he needed time to learn where and how the problem  
7 originated in order to answer the IRS deficiency notice. He eventually found that  
8 the problem lay with the title company and the two other companies belonging to  
9 Mr. Patronaggio. [Tr. 23: 7-13]

10 7. Mr. Patronaggio owned two feeder companies that had not received  
11 closing costs statements from the title company that had handled the companies'  
12 transactions. As a result, the feeder companies had not been able to properly  
13 prepare their tax returns, which in turn, left Caliber homes unable to prepare its  
14 return. [Tr. 14: 5-9; 24:19-25:6]<sup>3</sup>

15 8. If the IRS receives no response to its ninety-day letter, a judgment is  
16 ordered against the taxpayer. In Mr. Patronaggio's case, a \$250,000 judgment  
17 would have been ordered if he had not responded. [Tr. 6:5-10]

18 9. Respondent explained that seventy percent of IRS matters are resolved  
19 with the IRS. The rest are resolved in Tax Court, which is a very expensive  
20 process.<sup>4</sup> [Tr. 10:18-22]

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21  
22 <sup>3</sup> Mr. Patronaggio owns three companies. Caliber Homes is the company  
23 that sells homes in Sierra Vista. Respondent refers to three feeder companies  
24 elsewhere in the transcript, but only two feeder companies exist with Caliber  
Homes being the third company owned by Mr. Patronaggio.

25 <sup>4</sup> Respondent's Counsel, Robert St. Clair, explained that those who refuse  
to pay the "assessment" may contest it in Tax Court. In those cases, attorney's



1           10. Mr. Patronaggio did not want to pay the IRS "assessment" and instead,  
2 chose to fight his case in Tax Court. [Tr. 11:18-21]

3           11. According to Respondent, he informed Mr. Patronaggio at their first  
4 meeting that he had handled many cases involving tax matters, but had never  
5 practiced in Tax Court, and advised Mr. Patronaggio to seek other counsel. [Tr.  
6 35:15-20]

7           12. Respondent's legal experience involves collection work for taxpayers,  
8 helping them reduce or rid their taxes, probate work, and bankruptcy litigation,  
9 involving in some cases, reorganization. [Tr. 36:8-21]

10           13. Notwithstanding Respondent's recommendation to Mr. Patronaggio  
11 that he find a lawyer who had practiced in Tax Court, Mr. Patronaggio returned  
12 several weeks later and informed Respondent that he wanted him to handle the  
13 matter. [Tr. 35:22-23]

14           14. According to Respondent, he agreed to represent Mr. Patronaggio, and  
15 informed him that the representation would cost between \$40,000 and \$60,000.  
16 [Tr. 6:11-13]

17           15. Although Respondent had not practiced in Tax Court, he felt confident  
18 that he understood all of the aspects of Mr. Patronaggio's case that were  
19 necessary to provide a good defense. [Tr. 36:22-37:5; 37:8-14]

20           16. Respondent submitted an application to practice in Tax Court, and  
21 received his approval to do so in four days. [Tr. 9:22-10:3]

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22  
23 fees and interest are not awarded. Those who choose to pay the "assessment" are  
24 permitted to sue the government in Federal Court for a refund plus additional  
25 compensation. [Tr. 11:1-11]

1           17. Mr. Patronaggio subsequently asked Respondent to take on the other  
2 matters. [Tr. 6:17-19]

3           18. Respondent interviewed Mr. Patronaggio concerning his goals as they  
4 related to the Family Limited Partnership. [Tr. 45:11-16]

5           19. Respondent set up a favorable family limited partnership for Mr.  
6 Patronaggio, although he did not create many documents for that purpose. [Tr.  
7 11:24-12:3]

8           20. Respondent explained that, typically, clients who want a Family  
9 Limited Partnership created are also involved in creating a family estate plan.  
10 Much of the work done in these types of cases involve formulating theories under  
11 which entities will be created and plotting out the best course of action for the  
12 client. [Tr. 13:4-12; 13:25-14:5]

13           21. Respondent generally creates a diagram, showing the general partner  
14 and the limited partners, after which he sends the diagram to the client to have  
15 him fill in the names of those who will fill those roles. [Tr. 12:3-6]

16           22. Respondent explained that the drafting of the documents in both estate  
17 planning and family limited partnerships is the last stage in the process. [Tr.  
18 13:19-23]

19           23. Respondent took Mr. Patronaggio's information and determined how  
20 various entities were related, and which people were needed to make it flow  
21 properly. This took approximately four to five hours. [Tr. 45:14-46:1]

22           24. Respondent also investigated the entities that were going to be  
23 included in the Family Limited Partnership. [Tr. 46:2-5]

24           25. The Family Limited Partnership was to consist of Caliber Homes and  
25 the two feeder corporations, one which owned several real estate lots and the

1 other, which was used to bring assets into the partnership. [Tr. 15:12-14]

2 26. Respondent found that certain tasks needed to be completed in order  
3 to make the entities that were in disarray fit into the Family Limited Partnership.  
4 [Tr. 46:6-14]

5 27. In Mr. Patronaggio's estate plan, trustees were already named for his  
6 trust. Respondent inquired of him whether he wanted the same people involved  
7 in the Family Limited Partnership, to which Mr. Patronaggio responded that he  
8 did not know because he did not trust anyone. [Tr. 13:12-16]

9 28. Because Mr. Patronaggio did not provide the necessary information to  
10 Respondent, Respondent was not able to complete the organizational document  
11 that would have been the last step in the process. [Tr. 12:19; 47:18-25]

12 29. Respondent explained that in a Tax Court case where feeder  
13 corporations are involved, tax returns must be sent to the IRS in proper order.  
14 Respondent hired an expert, retired from the IRS, with whom he had at least five  
15 meetings to assure that materials were correctly sent to the IRS. [Tr. 18:2-7]

16 30. Mr. Patronaggio's three companies were each of interest to the IRS.  
17 The IRS agent wanted to conduct disclosure, and wanted information about these  
18 companies, including American Homes, which was the company providing lots  
19 to Caliber Homes. [Tr. 15:20-24]

20 31. When Respondent informed Mr. Patronaggio that they needed to  
21 provide discovery, Mr. Patronaggio refused to give Respondent consent to do so.  
22 [Tr. 14:10-12; 15:25-16:4]

23 32. At that time, Respondent began feeling stressed about the fact that he  
24 could not "give him his results and I couldn't do anything about it." [Tr. 54:15-  
25 23]

1           33. Respondent informed Mr. Patronaggio that he should seek out other  
2 counsel who felt differently about providing discovery. Mr. Patronaggio  
3 informed Respondent that he wanted to think about it, and took approximately  
4 four months to make a decision. [Tr. 16:4-7; 39:18-40:1]

5           34. As a result of their differences of opinion on discovery, little was done  
6 to move the IRS matter along. However, Respondent continued to protect Mr.  
7 Patronaggio's interests, as Respondent was receiving calls from the IRS, asking  
8 when he was going to provide the requested information. [Tr. 40:2-8]

9           35. During that that four-month period, Mr. Patronaggio did not request a  
10 refund. Mr. Patronaggio was unavailable, as was Ms. Sabbagh, who was looking  
11 for another job, and Respondent believed he needed to give Mr. Patronaggio time  
12 to find other counsel. [Tr. 16:13-24]

13           36. In late June, Mr. Patronaggio and Ms. Sabbagh asked for a billing  
14 statement, which was provided in two days. [Tr. 16:25-17:12]

15           37. Mr. Patronaggio accused Respondent of doing nothing to earn the fees  
16 paid, and according to Respondent, requested a full refund. [Tr. 17:15; 19:20]

17           38. According to Respondent, he was willing to discuss his fees and to  
18 make a partial refund if he had been overpaid, but he was not willing to make a  
19 full refund for services already performed. Respondent offered to engage in Fee  
20 Arbitration, but Mr. Patronaggio refused his offer. [Tr. 19:17-20:1; 26:5-9]

21           39. As to the asset purchase agreement/sale of the company, Respondent  
22 was to handle the selling of Mr. Patronaggio's lots to buyer, John Metalone. [Tr.  
23 18:22-24]

24           40. Specifically, Mr. Metalone wanted to acquire Mr. Patronaggio's lots  
25 free and clear. In return, Mr. Metalone was to put up property as collateral that

1 would secure the payments he was to make to Mr. Patronaggio. [Tr. 43:2-12]

2 41. Respondent reviewed the work Ms. Flaggler had done with regard to  
3 the sale of the company and learned that it did not secure Mr. Patronaggio's  
4 interest. Additionally, it did not allow for any collateral for the purchase. [Tr.  
5 19:1-6]

6 42. Respondent's involvement in the sale of the business included limited  
7 negotiation of the terms of the transaction, but primarily determination of the  
8 sufficiency of the collateral put up by the buyer in order to protect Mr.  
9 Patronaggio's interest because Mr. Metalone had no other assets. [Tr. 42:24-43:1;  
10 43:13-44:3]

11 43. Respondent called the County Recorder to find out if Mr. Metalone's  
12 lots were free to be put up as collateral. Two were and two were not. [Tr. 42:9-  
13 16]

14 44. Respondent spoke to Mr. Metalone's attorney and attempted to secure  
15 collateral for the sale. [Tr. 42:2-3]

16 45. Respondent presented his findings to Mr. Patronaggio, who informed  
17 Respondent that he still wanted to proceed with the sale. [Tr. 19:6-9]

18 46. Respondent spent ten to fifteen hours of his time on the asset purchase  
19 agreement/sale of the business. [Tr. 44:4-5]

20 47. The asset purchase agreement, a two-page document that was  
21 submitted to the State Bar by Complainant, was just an example of type of  
22 document that could be created for the sale. [Tr. 48:9-16]

23 48. At one point, Respondent received a call from Ms. Sabbagh. She  
24 stated that Mr. Metalone and his lawyer were attempting to take over Mr.  
25 Patronaggio's office, even though the sale of land had not concluded. [Tr. 19:9-

1 16; 44:6-45:3]

2 49. Respondent learned that Mr. Metalone's attorney was not licensed in  
3 Arizona. Respondent was able to remove him from Mr. Patronaggio's office,  
4 allowing Mr. Patronaggio to retain his business. [Tr. 45:5-10]

5 50. Although Mr. Patronaggio did not originally comply with Respondent's  
6 request to proceed with discovery in the IRS matter, within two weeks of  
7 Respondent's termination, Mr. Patronaggio "did all of the things he refused to do  
8 prior to that." [Tr. 24:3-12]

9 51. Respondent opined that, if Mr. Patronaggio had not changed his mind  
10 about providing discovery to the IRS, the IRS would have filed deficiency  
11 notices against Respondent's two other companies, making the matter a  
12 \$700,000, rather than a \$250,000 case. Respondent had explained this to Mr.  
13 Patronaggio. [Tr. 25:6-14]

14 52. Ultimately, Respondent believes the breakdown in the relationship  
15 with Mr. Patronaggio resulted from the latter's fear that his other companies  
16 would be discovered. As a result of that fear, Mr. Patronaggio wanted to hold off  
17 as long as possible on providing discovery. [Tr. 49:19-25]

18 53. Respondent believes that once the information on those other  
19 companies was disclosed, the costs of the lots were revealed and the amount of  
20 taxes owed by Caliber Homes was significantly reduced. Respondent had been  
21 telling Mr. Patronaggio and Ms. Sabbagh that that would occur for four months.  
22 [Tr. 49:25-50:3; 50:16-17]

23 54. At the time Respondent's services were terminated, that information  
24 was coming to light. The information became available in June 2005, and  
25 Respondent was terminated in late June 2005. [Tr. 50:4-14]

1           55. With regard to the corporate minute books, very little was done. [Tr.  
2 18:9-11]

3           56. Respondent admitted that he "wasn't the best timekeeper", but he was  
4 not aware that he needed to keep time records for flat fee relationships. [Tr. 8:21-  
5 23]

6           57. Respondent submitted four documents for the record: a one-page  
7 summary of services provided to Mr. Patronaggio; a one-page medical history; a  
8 letter from Respondent's doctor, Steve Wool, describing Respondent's medical  
9 conditions and the treatment he has been receiving; and a document reflecting  
10 additional time spent on Mr. Patronaggio's matters.<sup>5</sup>

11           58. Because of his medical condition, Respondent did not practice law for  
12 three years, as he did not feel he was aware enough to practice effectively. [Tr.  
13 30:12-16]

14           59. Thereafter, Respondent clerked for a law firm, Kerry, Schackett &  
15 Dusenberry, for two years. [Tr. 30:16-18]

16           60. While working at the firm, Respondent began researching tax issues,  
17 which gave him confidence that he "was doing better." [Tr. 30:22-31:1]

18           61. When the firm split up, Respondent began practicing law again.  
19 Currently, Respondent practices between thirty to forty hours weekly so that he  
20 can carefully and effectively handle his workload. [Tr. 31:1-7]

21           62. Respondent presently works with his attorney, Robert St. Clair, whom  
22 he believes is very satisfied with the work he performs. [Tr. 31:14-16]

23           63. Respondent states he has an excellent reputation for documents. Other  
24

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25           <sup>5</sup> See attached Respondent's Exhibits 1, 2, 3 and 4.

1 attorneys call him to learn how he drafts certain documents. [Tr. 31:16-18]

2 64. A discussion took place regarding Respondent's medical and mental  
3 health concerns.<sup>6</sup>

4 65. Respondent did not recall any particular health problems at the time  
5 he represented Mr. Patronaggio. [Tr. 51:3-6]

6 66. Respondent recently attended a Trust Account Seminar, which put  
7 into perspective all of the necessary elements for an effective Trust Account  
8 management system. [Tr. 52:1-13]

9 67. At the time of the representation, Respondent kept track of the time he  
10 spent on Mr. Patronaggio's matters by writing his client's name on his calendar,  
11 but generally not the task he was performing. [Tr. 55:2-10]

12 68. According to Mr. St. Clair, Respondent keeps his time daily and his  
13 assistant converts his writings into computerized records on a weekly or  
14 biweekly basis. Respondent also deposits flat fees into the Trust Account, and  
15 they are not accessed until the work relating to the fees has been performed. [Tr.  
16 53:7-22]

### 18 III. CONCLUSIONS OF LAW

19 Respondent conditionally admitted in the Tender of Admissions and  
20 Agreement for Discipline by Consent (the "Tender") that he violated Rule 42,  
21

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22  
23  
24 <sup>6</sup> Respondent has filed a Motion to Seal Medical Records, requesting that  
25 those portions of the hearing transcript that refer to his medical condition, as well  
as Respondent's Exhibits 2 and 3, be sealed from Complainant and the Public.



1 Ariz.R.Sup.Ct., specifically ER 1.5, and ER 1.15, and Rules 43 and 44,  
2 Ariz.R.Sup.Ct. The Hearing Officer incorporates those conditional admissions  
3 into these Conclusions of Law.  
4

#### 5 IV. RECOMMENDED SANCTION

6 The recommended sanction is based on the applicable *ABA Standards for*  
7 *Imposing Lawyer Sanctions* ("Standards"), 1991 edition, including the relevant  
8 aggravating and mitigating factors, as well as a review of the applicable case law  
9 regarding proportionality of the proposed sanction.  
10

##### 11 1. Applicable Standards

12 ABA Standard 3.0 provides that four criteria should be considered: (1) the  
13 duty violated; (2) the lawyer's mental state; (3) the presence or absence of actual  
14 or potential injury; and (4) the aggravating and mitigating circumstances, as  
15 previously stated in the Amended Hearing Officer's Report. The Hearing Officer,  
16 however, also finds that *Standards* 9.32(c) and (h) be included in mitigation,  
17 given Respondent's significant mental health and physical disabilities.  
18  
19

20 The parties previously agreed that Respondent violated his duty to his  
21 client, as a professional, and to the system by deviating from the standard of care  
22 that a reasonable lawyer would exercise in maintaining his trust account and trust  
23 account records. The parties also agreed that Respondent was negligent in  
24 observing the rules governing the treatment of client funds by attorneys;  
25

1 specifically he transferred funds to himself without determining how much work  
2 he had completed on behalf of his client and failed to keep adequate records of  
3 time spent providing services.  
4

5 The Hearing Officer finds that Mr. Patronaggio was injured to the extent  
6 that he did not promptly receive an accurate calculation of the fees paid to  
7 Respondent, and a refund of unearned fees due to Respondent's failure to keep  
8 adequate trust account records.<sup>7</sup> This was not the result of a selfish motive.  
9 Given that the mitigating factors now outweigh the aggravating factors, the  
10 Hearing Officer believes that a censure and a one-year term of probation is an  
11 appropriate sanction in this matter.  
12

## 13 2. Proportionality

14 The Hearing Officer incorporates the cases previously provided in the  
15 Amended Hearing Officer's Report into this section on proportionality.  
16

17 Additionally, *In re Mulligan*, SB-08-0029-D (2008) should be considered.  
18 In *Mulligan*, the lawyer was found to have violated ERs 1.15, 1.8(b), and Rules  
19 43, 44, and 53. Two aggravating factors were found in *Mulligan*: (1) prior  
20 disciplinary offenses, as the lawyer received two Informal Reprimands in 2006,  
21  
22

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23  
24 <sup>7</sup> As a result of a Confidential Settlement Agreement, Mr. Patronaggio and  
25 Respondent settled the issue of attorney's fees.

1 one for a violation of ER 1.8 and the other for a violation of ER 1.15, and an  
2 Informal Reprimand in 1995 for violations of ER's 1.1 and 1.4; and (2)  
3 substantial experience in the practice of law, as the attorney had practiced in  
4 Arizona for twenty-one years. Three mitigating factors were found in *Mulligan*:  
5 (1) absence of dishonest or selfish motive; (2) timely good faith effort to make  
6 restitution or to rectify consequences of misconduct; and (3) remorse.  
7

## 8 9 V. CONCLUSION

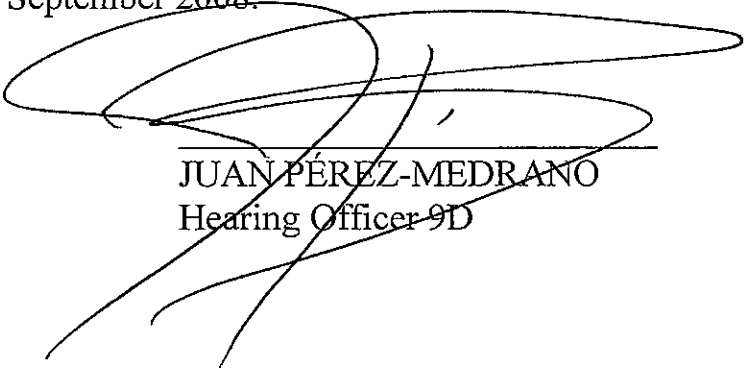
10 Respondent's conduct in this matter resulted from his negligence and  
11 inadequate attention to his timekeeping. According to Respondent, he failed to  
12 recognize that adequate timekeeping is a necessary element of every  
13 representation. Respondent's attendance at the State Bar's Trust Account  
14 Seminar has educated him in the importance of timekeeping and appropriate  
15 accounting methods, which he has, now, incorporated into his practice.  
16

17 Respondent explained, at the hearing on the consent documents, that he  
18 provided services for his client, although there was not significant documentation  
19 evidencing those services. He also explained the serious obstacles he has  
20 encountered and the steps he has taken to deal with and overcome those  
21 obstacles.  
22

23 Given that Respondent has had only one prior disciplinary offense in his  
24 thirty-five years of practice, has suffered from significant mental and physical  
25

1 health issues, and has made a conscious effort to rectify his past accounting  
2 practices, the Hearing Officer finds that a censure and one-year probation, which  
3 includes TAEPP and TAP, is appropriate under these circumstances.  
4

5 **DATED** this 15<sup>th</sup> day of September 2008.

6   
7  
8 JUAN PÉREZ-MEDRANO  
9 Hearing Officer 9D  
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22 Original filed with the Disciplinary Clerk  
23 of the Supreme Court of Arizona this 17<sup>th</sup> day  
24 of September, 2008.

25 By: Neeta Manelkar

1 Copies of the foregoing mailed this 18<sup>th</sup> day  
2 of September, 2008, to:

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